Virginia City Hybrid Energy Center
Response to Data Request
Bruce Buckheit, Member, Virginia Air Pollution Control Board

Question (Page No. 8):

To what extent are the waste coal and gob in Wise County "orphan wastes" as that term is used in the Superfund context? Where there is no financially viable party that is responsible for waste materials different public policies may apply. Here, it may be that the effect of permitting burning waste materials is a shift of long term cost for management of waste materials from coal mine operators to the ratepayers. If there is no readily available information, simply identify that fact.

Response:

To paraphrase the question, "is gob a hazardous substance within the reach of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* ("CERCLA")?"

Though CERCLA authorizes unreimburseable investigations of and responses to other potential pollutants or contaminants, it only assigns liability to four categories of parties associated with defined "hazardous substances."[1] Hazardous substances are defined as including, among other things: any listed or characteristic RCRA "hazardous waste," but excluding Bevill Amendment wastes; and any "element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title [under CERCLA].

Gob is exempt from the definition of RCRA "hazardous waste" under 42 U.S.C. 6921 (b)(3)(a)(ii). Thus, the question is whether it otherwise may be a hazardous substance under CERCLA Section 101(14). Though the courts are divided as to whether exclusion of Bevill Amendment wastes under RCRA was intended by Congress to serve to exclude them from being considered hazardous substances under CERCLA, the majority of courts and the EPA have concluded that they may be hazardous substances under CERCLA if qualified on another definitional ground.[2] However, the EPA list of

[1] 42 U.S.C. §9601(14) and §9607(a).

[2] Compare, e.g., *United Sates v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1554-62 (E.D. Cal. 1993) (Bevill Amendment wastes not otherwise subject to regulation as hazardous substances under CERCLA) with *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d. 922, 927 (D.C. Cir. 1985) (any of six definitional subsections of Section 101(14) support hazardous substance status), *State of Idaho v. Bunker Hill Co.*, 635 F.Supp. 665, 672-673 (D. Idaho 1996) (same) and *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 6 F.3d 1332, 1337-1340 (9th Cir. 1993) (Bevill exemption status has no bearing on whether materials are hazardous substances under other subparts of Section 101(14). *See also,* 48

CERCLA hazardous substances, promulgated pursuant to Section 102, does not include sulfur[3]; and the EPA has noted, in connection with its policies and guidance relating to abandoned mine lands, that: "[f]rom a mining perspective, only sulfates are excluded from the broad coverage of hazardous substances."[4]

As a practical matter, no coal waste piles have been remediated under CERCLA. Moreover, although the CERCLA National Priorities List has included over 60 mining-related sites[5], a reasonably diligent review of information made accessible by EPA via the Internet and a thorough review of decisional law concerning RCRA and CERCLA civil litigation have not revealed a single instance in which the EPA has proposed the listing of, or listed, a gob pile on the NPL or determined that a gob pile may present an imminent and substantial endangerment for purposes of either RCRA Section 7003 or CERCLA Section 106. Nor did a review of decisional law indicate that the United States ever has asserted, or that any court ever has concluded, that any person or business was a responsible party under any of the four categories of liability set forth in CERCLA Section 107 because of their association with a gob pile. Thus, it appears that the EPA has committed little, if any, Superfund money to addressing, gob piles and that the Government has not attempted to exercise any enforcement authority in connection with a gob pile.[6] Thus as a practical matter, such gob piles have not been "orphan sites." .

Fed. Reg. 40,653-663 (1983) and www.epa.gov/aml/policy/index.htm at Appendix C, page 19 (September 1997) ("The fact that a substance may be specifically excluded from coverage under one statute does not affect CERCLA's jurisdiction if that substance is listed under another statute or under section 102.")

[3] 40 C.F.R. §302.4, Table 302.4.

[4] www.epa.gov/aml/policy/index.htm, Appendix C, page 19 (September 1997).

[5] www.epa.gov/aml/policy/indes.htm, Appendix F, page 17 (September 1997).

[6] Although the United States has taken enforcement action under CERCLA in connection with several hardrock sites -- particularly those at which processing has resulted in acute metals contamination -- EPA's table of authorities available to address abandoned mine lands does not include a listing for either the RCRA program or the Superfund program. www.epa.gov/superfund/programs/aml/tech/rntables.pdf, *Table 4-1: Federal Regulatory & Programatic authorities for Cleaning Up AML.* In light of the apparent absence of efforts to assign CERCLA liability in connection with a gob pile since CERCLA's enactment in 1980, any effort to imagine circumstances that might give rise to potential liability would be highly speculative.